

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

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5 SILAS CALHOUN and
6 EMILY CALHOUN, Individually
7 and as Parents and Next
8 Friends of ESTELLA CALHOUN,

9 Plaintiffs,

10 vs.

Case No.: 04-10480-RGS

11 UNITED STATES OF AMERICA,
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13 Defendant.

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COPY

20 Videotaped Deposition
21
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23

of

24 TODD ELWYN, J.D., M.D.
25
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Saturday, March 31st, 2007

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23

24 Reported by:

SHARON C. HOLLOWAY

25 CSR No. 12227

Job No. 9465/56098

1 almost seven months.

2 She was found to have age-appropriate
3 skills in all of the areas that were assessed. And
4 these included, you know, various things, such as
5 social/emotional and self-care and that sort of
6 thing. But, again, because of her diagnosis and her
7 seizure history, the program found her eligible for
8 early intervention services.

9 The early intervention services would
10 include monthly visits by a nurse, attendance at a
11 weekly baby or parent group, and it was recommended
12 that she be monitored closely because of what had
13 happened following birth. And my understanding is
14 that these services continued for approximately one
15 year.

16 Okay. So now we're into -- roughly, her,
17 you know, age, she's about age 20 months, and Emily,
18 Estella's mother, has reported that this is when she
19 first noted that there were some distinct behavioral
20 problems with Estella about this time.

21 Specifically, she described a high activity
22 level and aggression toward other children, which
23 included hitting. She also would hit others with
24 objects and with her hands. She had some difficulty
25 remaining asleep.

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1 And she was particularly aggressive toward
2 her brother, Cy Henry. She would try to pull him
3 off other people's laps when he was being held. On
4 one occasion when he was about one month old, she
5 scratched his face with a fork. And it appeared to
6 Emily that Estella would wait until no one was
7 watching and then she would go after her brother and
8 try and hurt him.

9 The parents tried to control this behavior,
10 and she appeared to -- Emily -- excuse me -- Estella
11 appeared to understand what her parents were saying,
12 but they had difficulty redirecting her, and they
13 would have to remove her from the situation.

14 Okay. After one year involved with the
15 Minute Man Early Intervention Program, she was
16 reassessed, and in all areas of development that
17 were assessed she was found to be age-appropriate.
18 She -- she was deemed no longer eligible for early
19 intervention services and discontinued that program.

20 Emily, Estella's mother, reports that the
21 behaviors continued. And there were some other
22 behaviors that she described that I won't go into
23 here because later, when she sees occupational
24 therapists, they -- they go into it much more. But
25 she did continue to run around a lot and -- and that

1 various sensory modalities.

2 So there are children who can't tolerate
3 being touched, and when you try and hug them or do
4 the usual things that you do with an infant, they
5 scream. There are other children who have, you
6 know, hypersensitivities of sound or, you know, it
7 could be a variety of -- of the sensory modalities.

8 But I think the conceptualization by
9 occupational therapy is that they have a limited
10 ability to integrate the various sensory stimuli
11 that come in and they get easily overwhelmed by
12 them. And so that's sort of labeled as "sensory
13 integration disorder," and they have various
14 techniques and therapies that they use to address
15 those -- those needs.

16 So when I read that Estella has an
17 increased need for deep proprioceptive input, I
18 believe that we are talking here about -- about, you
19 know, her sensory integration needs. And based upon
20 that formulation, the occupation therapist would
21 then come up with some techniques to help her with
22 these sensory integration issues.

23 Q. You can continue.

24 A. Okay. As I mentioned, after being
25 discharged from the Minute Man Early Intervention

1 Program, I guess it was the next month, she was --
2 she, meaning Estella, was observed and assessed for
3 about three hours by Judy King, who has a master's
4 degree in education and is an early childhood
5 special educator.

6 Ms. King also reported that Estella seemed
7 to crave proprioceptive input. And she also
8 described some behaviors that she observed. And
9 these were things like running back and forth across
10 the room, running in circles, shaking her head from
11 side to side while playing alone, hitting her
12 brother, you know, not complying when her mother
13 attempted to discipline her.

14 Let's see. She was kind of demanding. She
15 wouldn't accept her mother's explanation when her
16 mother said that -- that the Barbie toy that she was
17 seeking, she didn't -- Mother didn't know where it
18 was. And she -- she was crying for the toy and hung
19 on Mother's leg.

20 It was reported by Ms. King that once she
21 intervened -- that is, Ms. King --

22 We just had a power outage.

23 (Discussion held off the record.)

24 VIDEO OPERATOR: We are off record at
25 12:51.

1 (Pause in proceedings.)

2 VIDEO OPERATOR: We are back on record at
3 12:53.

4 Q. BY MR. APPEL: Now, Dr. Elwyn, you were in
5 the middle of describing some observations by
6 Judy King, a childhood educator.

7 Again, this is -- just to be precise about
8 the date, this is on -- in March -- March 23rd,
9 2003, when Estella is just a little bit past her
10 third birthday; correct?

11 A. Yes, that's correct.

12 Q. All right. Would you --

13 A. Sure.

14 Q. Would you continue? Yeah.

15 A. Yeah. I think we were talking about, yeah,
16 the observations by Ms. King that Estella's
17 behavior -- you know, she -- she was very active,
18 and then also that she seemed to respond well when,
19 you know, sort of firm and consistent limits were
20 placed on her by Ms. King.

21 And then Ms. King observed that Estella had
22 difficulty modulating sensory input. And this, in
23 her mind, impacted Estella's ability to attend to
24 the task, to stay on the task, and to sort of behave
25 as you would be expected to behave in -- in that

1 sort of a situation.

2 So because of that, Ms. King recommended
3 that Estella receive assessment and services from an
4 occupational therapist who was experienced with
5 children with this sensory integration dysfunction.
6 And she made some other recommendations that
7 included a sensory diet and also that -- that limits
8 be placed on Estella in a firm and consistent
9 manner.

10 MR. GIEDT: Dr. Elwyn, just --

11 THE WITNESS: Yes?

12 MR. GIEDT: Can I just ask what page of
13 your report you're on?

14 THE WITNESS: Sure. I -- I think it's
15 page 8 of -- of 24. Is that --

16 MR. GIEDT: Thank you.

17 THE WITNESS: Okay.

18 MR. GIEDT: Please continue.

19 THE WITNESS: The following week, Estella,
20 in fact, did undergo evaluation by an occupational
21 therapist, Kerri Colantuno, from the Children's
22 Hospital, due to these concerns about her sensory
23 processing issues.

24 She did a -- an evaluation that included,
25 you know, talking with the parents, getting some

1 information from a parent questionnaire, and then
2 also she made some clinical observations as to
3 what -- what she observed during her assessment
4 process.

5 The testing results reportedly indicated
6 that Estella demonstrated significant sensory
7 defensiveness and associated state regulation
8 difficulties that impacted her ability to function
9 in everyday activities such as school, performing
10 hygiene tasks, and when interacting with peers.

11 She -- the "sensory regulation," again, it
12 was -- she defined it as the ability to maintain
13 one's arousal level in a calm and organized manner.
14 And "sensory defensiveness" was defined as the
15 overreaction of the body's normal protective senses
16 to everyday sensory input.

17 So she was described as a child that is
18 impulsive and always on the move, as having a lot of
19 energy, and as being unable to sit still for a whole
20 meal.

21 I won't go over the -- the part of the
22 report that's based upon Mother's report since it's
23 consistent with what's been reported before and what
24 I've mentioned.

25 Okay. The -- the occupational therapy

1 evaluation noted that Estella demonstrated tactile,
2 auditory, visual, and olfactory sensitivities.
3 She -- she didn't like playing with messy things;
4 she didn't like having hand -- dirt on her hands;
5 she didn't like to go barefoot in the sand; and she
6 was -- she was very ticklish; she would become upset
7 if somebody bumped into her.

8 And then she had some specific clothing
9 preferences, things that she just didn't want to
10 wear, like hats and scarves and clothing around her
11 neck or tight-fitting clothing. And she also didn't
12 like to have her face or hair washed, she didn't
13 like water on her face. And if this was done, she
14 would scream and cry.

15 She liked to chew on objects. She would
16 chew on her sleeves, on her hands, other objects. I
17 know that she would chew on string. She also had
18 specific food preferences; the temperature of the
19 food, the texture, the brand. She would only eat
20 Prego marinara sauce spaghetti, or something like
21 that.

22 She had a very strong sense of smell. She
23 wouldn't use public bathrooms. She was sensitive to
24 bright fluorescent lights, sunlight, windup toys,
25 loud noises.

1 for further occupational therapy services.

2 As I mentioned, she had been receiving
3 occupational therapy from the Department of
4 Education. There was a comprehensive evaluation
5 done that was -- starting in August of '03 that
6 looked at her cognitive and academic functioning
7 and, you know, her speech and language, family
8 history, and --

9 Q. Dr. Elwyn?

10 A. Yes?

11 Q. In terms of the context of this evaluation,
12 I take it -- and correct me if I'm wrong -- that at
13 this time she was about to enter preschool in the
14 Hawaii -- in the Hawaii school system.

15 A. Yes. Correct.

16 Q. And so the -- what you're about to describe
17 are the -- this is an evaluation to what -- for what
18 kinds of services she would need within that system.

19 A. That -- that's correct. Yeah. She had
20 this history, and it was determined that she might
21 be eligible for some special educational services to
22 address her needs. And so this was -- this is the
23 assessment process that you go through if you -- if
24 you have those.

25 So she was evaluated. In August of '03,

1 the Wechsler Preschool and Primary Scale of
2 Intelligence - Third Edition -- that's abbreviated
3 as the WPPSI-III -- that was administered. And the
4 results of that indicated she had a Verbal IQ score
5 of 102, a Performance IQ score of 82, and then a
6 Full Scale score of 91.

7 She was noted to have well-developed
8 comprehension and auditory memory and processing
9 skills, but was found to have significant weakness
10 on tasks that assessed her visual alertness and her
11 matching/copying skills.

12 And she was apparently more successful when
13 presented with auditory or verbal items than when
14 presented with nonverbal items that required object
15 manipulation for problem solving.

16 And so there were a number of
17 recommendations that came out of this, things like
18 having tasks be broken into short segments with
19 opportunity to review frequently. This would
20 facilitate her learning. Appropriate behavior was
21 to be immediately reinforced. She was to have
22 immediate consequences for inappropriate behavior.
23 And visually -- visual -- visually presented
24 material was to be kept simple in format and
25 uncluttered by excessive stimuli.

1 The Kaufman Survey of Early Academic and
2 Language Skills was administered. She earned scores
3 that fell apparently within the normal range. She
4 was cooperate -- excuse me -- cooperative throughout
5 the testing, but she did appear to be fidgety and
6 had difficulty attending to the tasks.

7 And so some similar recommendations -- you
8 know, giving carefully sequenced -- sequenced
9 lessons, simple explanations, and reinforced drill
10 practice to give her, you know, opportunity to
11 repeat things and reinforce them.

12 Let's see. The Vineland Adaptive Behavior
13 Scales were also administered in August of '03. She
14 was found to have adequate adaptive levels in -- or
15 above in several areas. But she -- in the -- in
16 subdomains, she was noted to have a low adaptive
17 level of play -- level for play and leisure time and
18 a moderately low adaptive level for expressive
19 communication. But the others were within -- within
20 normal limits.

21 Class -- this assessment process included a
22 classroom observation by the school counselor for
23 about 20 minutes. And Estella was assessed as
24 sometimes following directions as observed and
25 sometimes responding appropriately to requests by

1 her mother. But her activity level was assessed as
2 being appropriate to the situation.

3 She was found eligible for special
4 education services under the category of emotional
5 disturbances due to exhibiting aggressive behaviors,
6 being difficult to discipline, and having
7 sensitivity issues.

8 She was placed in a fully self-contained
9 special education preschool class to address these
10 concerns, and the preschool teacher, Marjorie Ann
11 Kim, in October of '03 then completed a Conners'
12 Teacher Rating Scale.

13 And the results of that, Ms. Kim indicated
14 that Estella was very often inattentive or easily
15 distracted in class --

16 Q. Before --

17 A. Yes.

18 Q. Before you get to that, before you go
19 through that --

20 A. Sure.

21 Q. -- just in terms of --

22 Do you have the binder with you?

23 A. I do.

24 Q. And would you turn to page 382?

25 A. Okay.

1 Q. Yeah. And is that the Conners' Rating
2 Scale that you're talking about that was filled out
3 by Mrs. Kim?

4 A. Yes, it is.

5 Q. Okay. You can continue in describing the
6 kinds of behaviors that Mrs. Kim listed as
7 problematic.

8 A. Okay. Yeah, the Conners' Teacher --
9 Teacher Rating Scale is a -- is a scale that
10 basically lists criteria for ADHD and also for, you
11 know, some other conditions. And the teachers then
12 indicate either something is "not at all true,"
13 "just a little true," "pretty much true," or "very
14 much true." Or -- you know, in other words,
15 "never," "occasionally," "often," or "very often."

16 And the Conners' Teacher Rating Scale is --
17 is significant for having -- of the 28 different
18 items, all of -- all but -- looks like all but five
19 are rated as "very much true" or "very often,"
20 and -- and three of the others are "pretty much
21 true" or "often."

22 And so these refer to -- as I said,
23 these -- these questions are things like, "Is the
24 child," you know, "inattentive or easily distracted,
25 restless in the squirmy sense?" those sorts of

1 things.

2 So as I mentioned, Ms. Kim assessed Estella
3 as being very often inattentive or easily
4 distractive -- distracted, defiant, restless in the
5 squirmy sense, as disturbing other children, as
6 actively defying or refusing to comply with adults'
7 requests, as being always on the go or acting as if
8 driven by a motor, as having difficulty remaining
9 still, fidgeting with her hands or feet, squirming
10 in her seat, leaving her seat in situations in which
11 the -- remaining seated was expected, as having a
12 short attention span, as arguing with adults, as
13 only paying attention to things she was really
14 interested in, as having difficulty waiting her
15 turn, as -- as having distractibility or attention
16 span that was a problem, as having temper outbursts,
17 as running or climbing excessively in situations
18 where it's inappropriate, interrupting or intruding
19 on others, as having difficulty playing or engaging
20 in leisure activities quietly, she was excitable or
21 impulsive, and that she was always -- or was
22 restless or always up and on the go.

23 And -- and then the two items that Ms. Kim
24 felt occurred often were that she was spiteful or
25 vindictive and that she failed to finish the things

1 Individualized Education Program -- meeting was
2 held --

3 Q. Before you go on --

4 A. Okay.

5 Q. -- Doctor, again, let me just get the time
6 context here.

7 So at this point she's completed her first
8 year of preschool and by October of '04 is actually
9 into her second year of preschool; is that correct?

10 A. Yes. That's correct.

11 Q. And in Hawaii, the school year -- correct
12 me if I'm wrong -- starts in July and runs through
13 about May or June of the following year; correct?

14 A. That's right. I believe it starts in July,
15 although sometimes it -- it may start in August.
16 But it's -- it's right in that period there.

17 Q. So that the -- the IEP, the Individualized
18 Education Program meeting in October is now
19 happening in the fall of her second year of
20 preschool.

21 A. That is correct. So of course the school
22 is interested in determining whether she still
23 qualifies for special educational services.

24 And Estella was noted to have made gains in
25 her behavior. As mentioned, she could sit in small

1 and large groups when integrated with kindergarten,
2 although she sometimes required prompting to
3 participate. She sometimes would give an opposite
4 response when asked a question, but if you prompted
5 her, she would -- she would stop.

6 She was more aware of her behavior,
7 apparently more in control of her behavior. She was
8 calmer and thought to be less impulsive than she had
9 been before. But when she was around children who
10 were active and excitable, then she would sort of
11 follow their lead and become very active and
12 impulsive.

13 She demonstrated some reluctance or delay
14 in following directions. She had to be reminded or
15 she would walk ten or more feet away from the group.
16 And -- but she did demonstrate some improvement.
17 And so occupational therapy was discontinued for
18 her.

19 The next IEP meeting was held in January of
20 2005, so a few months later. And the decision was
21 made to continue placement in a special education
22 class. Her program was lengthened a bit to sort of
23 work on the transition activities with kindergarten
24 in anticipation of that.

25 Another IEP was held in -- in April. She

1 was able to demonstrate appropriate behavior in a
2 small-size class and was able to behave
3 appropriately when placed in a large group of 20 if
4 the special education teacher was present to -- to
5 monitor her behavior. And she required, you know,
6 reminders about her behavior to calm down, but then
7 she could do so.

8 So there were a number of short-term
9 objectives listed in her IEP, things that needed to
10 be addressed, and these were sort of goals. Things
11 like expressing herself verbally and refraining from
12 physically abusive behavior when upset, raising her
13 hand, remaining quiet, engaging in play or
14 conversation with three different children in one
15 week, that sort of thing.

16 And during the remainder of that year,
17 Estella was integrated with kindergarten once a week
18 for music and videos and center time, and every
19 other week for Hawaiiana, which is a class about
20 Hawaii.

21 Okay. So in -- we move forward to July of
22 2005, when Estella enters kindergarten. She had a
23 teacher named Mrs. Heatherington, who I understand
24 was sort of a substitute teacher, but she was there
25 for quite some time.

1 Q. Okay.

2 A. You know.

3 Q. And what -- what did you -- what --

4 What did you observe and what did you learn
5 at that time?

6 A. Well, that -- according to her parents,
7 that Estella and her brother, Cy Henry, continue to
8 have conflict. He fights back more, and so the
9 fights are a little bit more intense, apparently.

10 It was reported by Mom that Estella becomes
11 more hyperactive after school and especially if she
12 engages in some physical activity like jumping on
13 the trampoline. That will seem to stimulate her,
14 and she has a great deal of difficulty sort of
15 calming down, she gets sort of wound up. The
16 frequency of this sort of thing happening was
17 described as about once a day.

18 Mom noted that Estella looks different when
19 she's acting -- when she's hyperactive and kind of
20 wound up. There were some behaviors that Mother
21 referred to, like playing roughly with her dolls and
22 hitting them and banging them on the table and
23 saying "I hate you." There were some continued
24 references to sensory kinds of issues, like Estella
25 liking to be upside down, having her face in the